INDEX.

	Page.
STATEMENT	1
BRIEF OF ARGUMENT	4
ARGUMENT:	
I. Shipments of the "regulation change of station allowance" of Army officers' baggage were properly entitled to land-grant rates	5
II. The appropriation acts, providing funds out of which claimant's bills were paid, provided that such payments when made should be in full for the services rendered	13
III. The presentation of its bills, without reservation or protest, in the exact amounts for which they were approved and paid by the Government, estops claimant from now asserting that such bills were not for the full amount due	20
IV. If, as alleged in the petition, claimant's failure to present bills for the amount to which it now claims to be entitled was due to mistake, the mistake was of law	35
V. If there was no mistake claimant is concluded by its contract	37
VI. The request for additional findings of facts is improperly before the court; it is also without merit	40

AUTHORITIES.

Baird v. *United States* (96 U. S., 430)	32
Baltimore & Ohio Railroad Company v. *United States* (52 C. Cls., 468)	2, 8
Central Pacific Railroad v. *United States* (164 U. S., 93)	29, 30

Page.

Chicago, Milwaukee & St. Paul Railway Company v. *Clark* (178 U. S., 353) 33

Chicago, Milwaukee & St. Paul Railway Company v. *United States* (50 C. Cls., 412) 2, 3, 4, 5

Chicago & North Western Railway Company v. *United States* (104 U. S., 680) 31

Delaware, Lackawanna & Western Railroad Company v. *United States* (249 U. S., 385) 39, 40

Eastern Railroad Company v. *United States* (129 U. S., 391) 39

Finney v. *United States* (32 C. Cls., 546) 31

Great Northern Railway Company v. *United States* (42 C. Cls., 234) 31

Illinois Central Railroad Company v. *United States* (52 C. Cls., 53) 16

Lake Superior and Mississippi Railroad Company v. *United States* (93 U. S., 442) 13

Mail Divisor Cases (251 U. S., 326) 40

New York, New Haven & Hartford Railroad Company v. *United States* (251 U. S., 123) 40

Pickley v. *United States* (46 C. Cls., 77) 31

Railroad Company v. *United States* (103 U. S., 703) 28

United States v. *Adams* (7 Wall., 463) 26

United States v. *Bostwick* (94 U. S., 53) 32

United States v. *Child & Company* (12 Wall., 232) 27

United States v. *Edmondston* (181 U. S., 500) 36

United States v. *Garlinger* (169 U. S., 316) 30

United States v. *Union Pacific Railroad Company* (249 U. S., 354) 9, 13

Utermehle v. *Norment* (197 U. S., 40) 36

Decisions Comptroller XI (p. 174) 18, 23

Decisions Comptroller XXII (p. 263) 16

Rule 5, Supreme Court, December Term, 1869 (9 Wall., VII), superseded by present Rule 5, October Term, 1907 (210 U. S., 507) 40

Page.
Rule 1, Supreme Court (210 U. S., 505)..... 40

STATUTES.

Act of March 3, 1863 (12 Stat., 772)..... 35
Appropriation act of June 30, 1882 (ch. 254, 22 Stat., 117)..... 13
Deficiency act, August 5, 1882 (ch. 390, 22 Stat., 257).. 14
Army appropriation act of February 24, 1891 (ch. 284, 26 Stat., 770)..... 14
Act of March 3, 1909 (ch. 252, 35 Stat., 732)..... 15
Act of March 23, 1910 (ch. 115, 36 Stat., 243)..... 15, 16
Act of March 3, 1911 (ch. 209, 36 Stat., 1037)..... 15
Act of August 24, 1912 (ch. 391, 37 Stat., 569)..... 15
Act of March 2, 1913 (ch. 93, 37 Stat., 704)..... 15
Act of April 27, 1914 (ch. 72, 38 Stat., 351)..... 15, 16
Act of August 29, 1916 (ch. 418, 39 Stat., 619)..... 16, 17

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE OREGON-WASHINGTON RAILROAD & Navigation Company, appellant, *v.* THE UNITED STATES. } No. 134.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This suit was instituted in the Court of Claims to recover from the Government amounts in excess of those already paid to claimant as freight charges for transporting property of officers of the United States Army upon changing station.

Before any of the shipments involved in this case were made, many of the railroad companies of the United States, including claimant, entered into agreements with the United States to accept for transportation at land-grant rates property moved by the Quartermaster Corps, United States Army, for which the United States is lawfully entitled to reduced rates over land-grant roads. (Finding II, R. 7.)

Claimant was not a land-grant road but was a party to this agreement. The Army regulations provided for shipment by the quartermaster at Government expense of certain weights of baggage for each officer upon change of station. (Finding IV, R. 8.) The allowance was graduated according to the rank of the officer.

Without any definite ruling upon the subject by the comptroller on any claim directly presenting the question (Finding of Facts, opinion of court, R. 18, 21; and opinion of court in case of *B. & O. R. R. Co.* v. *U. S.*, 52 Ct. Cls. 468, 474, 475), bills were rendered by all of the railroads, including claimant, to the Government for transportation of the authorized baggage allowance of officers at land-grant rates and not at the regular commercial rates. The bills as so rendered were paid by the Government and no protest was made or claim for additional amounts advanced by claimant. This continued until February 8, 1915, when the Court of Claims in an unreported case (50 Ct. Clms., 412) gave the Chicago, Milwaukee & St. Paul Railway Co. judgment against the Government for the difference between the land-grant rates paid to it for certain transportation of officers' baggage and the regular commercial rates, thus, in effect, holding that officers' baggage transported at Government expense upon change of station did not constitute property of the United States to the transportation of which land-grant rates were applicable. The correctness of this judgment is not conceded by the Government.

The theory of claimant in this case is that the judgment in the *Chicago, Milwaukee & St. Paul case* established that it was entitled to full commercial rates on all the shipments of officers' baggage for which it had only charged and collected land-grant rates, and recovery is asked for such difference on all shipments made over its road during the six years immediately preceding the filing of its petition and prior to February 8, 1915 (the date of the judgment in the *Chicago, Milwaukee & St. Paul Ry. Co. case*). (Finding VIII, R. 17.)

It is stated in the petition (R. pp. 1–6) that settlement of the freight bills presented by it to the Government was a mere matter of accounting, subject to correction at any time; and, quoting from the petition (R. 4, 5):

> Prior to the commencement of this suit and for the period covered by the transportation embraced herein, claimant's auditors, erroneously and by mistake, rendered its bills or vouchers for the transportation of household goods and other personal property of Army officers and other Government officials changing stations, shipped through the Quartermaster's Department of the Army upon Government bills of lading, upon the basis of the tariff rates with deductions on account of land-grant distance involved, and claimant's auditors so rendered its bills and vouchers for the transportation of that character embraced in this suit, although said deductions were not authorized or required by law or the bills of

lading upon which the shipments referred to were made, and payment for said transportation was made by the United States only on that basis.

It is further alleged in the petition that the company's auditors "were led and constrained" so to present its bills because the shipments were made by the Quartermaster Department of the Army upon Government bills of lading which are in terms only applicable to "Government property" and "public property," and because the comptroller had held that such shipments were entitled to land-grant rates. No protest, appeal to the comptroller, or to court is alleged; but it is claimed that its presentation and collection of its bills was not intended by it as a waiver, and that it at all times intended to maintain its right to sue, if so advised, for the balance on account of land-grant deductions.

BRIEF OF ARGUMENT.

The Government doubts the correctness of the judgment of the Court of Claims in the case of the *Chicago, Milwaukee & St. Paul case* (50 C. Cls. 412). If that judgment is erroneous, there is no foundation for the claim now advanced.

That case is therefore made the first proposition in our brief, because it logically comes first, not because of its importance in this case. If that judgment was incorrect, claimant, of course, is concluded; if correct, claimant is nevertheless barred. The argument on behalf of the Government is:

I. *Shipments of the "regulation change of station allowances" of Army officers' baggage were properly entitled to land-grant rates.*

II. *The Appropriation Acts providing the funds out of which claimant's bills were paid provided that such payments "shall be accepted as in full for all demands for such service."*

III. *The presentation of its bills, without reservation or protest, in the exact amounts for which they were approved and paid by the Government, estops claimant from now asserting that such bills were not for the full amount due.*

IV. *If claimant's failure to present bills for the amounts to which it now claims it was entitled was due to mistake, the mistake was of law.*

V. *If there was no mistake, claimant is concluded by its contracts.*

VI. *The request for additional findings of fact is improperly before the court; it is also without merit.*

ARGUMENT.

I.

Shipments of the "regulation change of station allowance" of Army officers' baggage were properly entitled to land-grant rates.

This question is really the primary one in the case; claimant's brief is written upon the assumption that the correctness of the holding of the Court of Claims in the case of the *Chicago, Milwaukee & St. Paul Railway Company* v. *United States*, 50 Ct. Cls. 412, is conceded by the Government because no appeal was

taken. Its correctness is not conceded and, as the question has never been passed upon by this court, it is still open. The case is unreported; there was no opinion. An examination of the record shows a very meager and, as we view it, wholly insufficient finding of facts. The findings and conclusions of law, omitting the first formal finding, are as follows:

II.

Some years ago, and before the transactions hereinafter mentioned, the railroad companies of the United States generally, including claimant, severally agreed with the Quartermaster General of the United States Army that they would each accept, for the transportation of Government troops and property, the amounts that would be payable by the Government, calculated by way of the cheapest route between the same terminal points. These agreements, known as "Equalization" agreements, are still generally in effect. The amounts due in settlement have been arrived at by taking the amounts due for the transportation at commercial rates by way of the practicable route between the terminal points of the movement affording the largest proportion of "land-grant" mileage and deducting from such amount fifty per cent of such part of the amounts as would accrue to said land-aided portion.

III.

Under the regulations of the United States Army in force at the times hereinafter stated each and every officer of the Army, when

changing station, was entitled to the transportation, at the expense of the Government, of a certain weight of household goods or other personal property belonging to him, the weight being graded by his rank.

IV.

In making payment to claimant for the transportation of the effects of certain officers since November 27, 1908, the accounting officers of the Treasury made deduction, from the amounts due for said transportation at ordinary commercial rates, on account of land grants, and paid to claimant only the same rates as were due to be paid for the transportation of property of the United States.

By reason of said deductions as shown in the appendix to the original petition filed herein, claimant has been paid four thousand four hundred and three dollars and eighty cents ($4,403.80) less than it would have received had it been paid for said transportation at the ordinary commercial rates.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides as a conclusion of law that the claimant is entitled to judgment of and from the United States in the sum of four thousand four hundred and three dollars and eighty cents ($4,403.80).

This case, such as it is, is the only ruling upon the question of the application of land-grant rates to shipments of this character.

The Court of Claims in the *Baltimore & Ohio case* (52 Ct. Cls. 468, 489) states:

> The conclusion we have reached is different from that in the *Chicago, Milwaukee & St. Paul Ry. Co.*, No. 32975, in which claimant had judgment. None of the questions herein were suggested by the defendants in that case. The Government's brief stated:
>
> "There is but one question involved in this case, and that is whether or not the railroads should carry the effects of officers when transferring stations at land-grant rates."
>
> As was suggested in *Wilson's case*, 38 Ct. Cls. 6, 10, the fact that a judgment has been rendered in another case does not present a sufficient reason for an entry of judgment in this case.

In the opinion in the present case the court says (R. 19):

> The question as to the applicability of land-grant rates to this class of transportation may be regarded as settled adversely by the *Chicago, Milwaukee & St. Paul Ry. Co. case*, decided by this court February 8, 1915.

The court then calls attention to the findings above quoted, showing that deductions had been made in the bills of the railroads by the accounting officers *of the Government*.

In neither the *Baltimore & Ohio case*, nor the present case, does the court find, except on the authority of the *Chicago, Milwaukee & St. Paul case*, that these shipments were not entitled to land-grant

rates. Therefore, as in that case, no reason for the holding is stated or indicated, it becomes important to ascertain whether or not there is any basis for the judgment rendered. It is submitted that the only possible reason could be that the words "of any property" in the land-grant acts mean property of which the United States is the absolute owner, and that therefore as the Government did not actually own the property of officers considered by it necessary to be transported at public expense, land-grant rates were not applicable. That is, that the words "any property" must be given the narrowest meaning, the same as the word "troops" as determined in *United States* v. *Union Pacific Railroad Company*, 249 U. S. 354. But in that case it is expressly stated (p. 356):

> In defining the transportation rights secured to the United States, these land-grant acts draw a broad distinction between freight and passengers. All "property" of the Government, whatever its character and intended use, is to be carried "free from toll or other charge," but of the many persons in the service, only "troops." The history of the legislation shows that both the broad term "any property," and the narrower one "troops," was adopted deliberately.

A distinction between the two cases is at once apparent. The persons whose status was passed upon in the *Union Pacific case* were in no sense "troops of the United States." The officers, the status of whose property is involved in the present case, were

officers of the regular United States Army, traveling under compulsory orders for the good of the public service, and the property shipped was the property determined by competent authority, military regulations, to be necessary "for their use in the discharge of their official duties" (Finding IV, R. 8). The term "baggage" includes all necessary property of an officer, including household goods. The amount necessary is determined; if an officer desires to transport more than is necessary, he can do so at his own expense. That the transportation of an officer changing station under orders is essential to the service of the public must be admitted; is it not equally essential that a certain amount of his property, which, as found by the Court of Claims is necessary in the performance of his public duties, be also transported? What amount is necessary is primarily to be determined by Army regulation, subject, of course, to review by court if an arbitrary or unreasonable regulation is made. Provision is made in the Army Appropriation Acts for the hire, by the Government, of draft and pack animals, harness, wagons, etc., for military purposes; when such property, which is clearly not the property of the Government in the absolute sense, is shipped over a land-grant road, are not land-grant rates applicable? If not, there is no provision of law for paying for such transportation, for, unless included as Government property under the land-grant acts and Army appropriation bills, there is no authority for the payment of transportation of such property, which belongs to private indi-

viduals. The property of an officer is just as much devoted to the public use as any military property owned absolutely by the Government. The Government has absolute control over an officer so that it can send him where and when it pleases, leaving him no option in the matter; does it not also control and use in the fullest sense the personal property which must necessarily go with him? Some officers own their own mounts, others do not; the benefit to the Government is really greatest in the case of private ownership. The mount is, of course, necessary to the performance of the officers' duties. May the Government ship the mount of one officer and not that of the other?

We have called attention to the appropriation acts under heading II of this brief. These acts all certainly fully authorize the transportation of officers' regulation allowance of baggage, unless such provision is repugnant to and controlled by the land-grant acts. We submit that there is no repugnancy, but that the term "any property" as used in the land-grant acts is entitled to at least a reasonable construction which makes that act consistent with the appropriation acts, and the construction adopted and followed for years both by the railroads and the Government.

It is further submitted that claimant in this case, not being a land-grant road, by its method of treating these shipments, has shown clearly that the intent of both parties to the equalization agreements (R. 7, Finding II) was that such shipments were entitled to

land-grant rates; by entering into that agreement it covenanted that it would—

> accept for the transportation of property moved by the Quartermaster Corps, United States Army, and for which the United States is lawfully entitled to reduced rates over land-grant roads, the lowest net rates lawfully available, etc.

At that time it knew that included in the "property moved by the Quartermaster Corps" was the regulation baggage allowance of officers, for the transportation of which the Government paid land-grant rates.

The property was moved by the Quartermaster Corps and was for all practical purposes the property of the United States, property over which the United States had dominion and control and which was devoted to its use. It is submitted that in view of the appropriation acts, the Army Regulations, the long-continued construction by all parties interested, and the facts, a holding that this property does not come within the provisions of the land-grant acts and equalization agreements, because it is not owned absolutely by the United States, is not only contrary to all rules of statutory construction but is contrary to ordinary common sense. Such holding would result in stamping all payments heretofore made to claimant as well as other railroads for like shipments as unauthorized and unlawful, for there is no provision in any of the appropriation acts for shipping private property; and under this construction no

shipments could be paid for out of the appropriations except shipments of property belonging absolutely to the Government.

II.

The Appropriation Acts, providing funds out of which claimant's bills were paid, provided that such payments when made should be in full for the services rendered.

Reference is made to the opinions of this court in *Lake Superior & Mississippi Railroad Company* v. *United States*, 93 U. S. 442, *United States* v. *Union Pacific Railroad Company*, 249 U. S. 354, and to the opinion of the Court of Claims in the *Baltimore & Ohio case*, 52 C. Cls. 468, and the present case (R. pp. 18–29) for the history of the land-grant acts and the appropriations out of which the bills for transportation over land-grant railroads have been and are payable.

After the decision in *Railroad Company* v. *United States*, 93 U. S., 442, above referred to (payment for transportation over land-grant roads having been prohibited for some time prior thereto), Congress provided in the Appropriation Act of June 30, 1882 (Ch. 254; 22 Stat. 117, 120), "for the payment for Army transportation lawfully due such land-grant railroads as have not received aid in Government bonds, to be adjusted by the proper accounting officers in accordance with the decisions of the Supreme Court in cases decided under such land-grant acts;" the payment was limited to not to exceed fifty per

cent of commercial rates and it was provided "such compensation * * * shall be accepted as in full for all demands for said services." The same provision was repeated in the Deficiency Act of August 5, 1882 (Ch. 390; 22 Stat. 257, 261–262).

The Army Appropriation Act of February 24, 1891 (Ch. 284, 26 Stat. 770, 775–776) provided—

> Army transportation: For transportation of the Army, including baggage of the troops when moving either by land or water; * * * for the payment of Army transportation lawfully due such land-grant railroads as have not received aid in Government bonds (to be adjusted in accordance with the decisions of the Supreme Court in cases decided under such land-grant acts), but in no case shall more than fifty per centum of the full amount of the service be paid: *Provided further*, That such compensation shall be computed upon the basis of the tariff or lower special rates for like transportation performed for the public at large, and shall be accepted as in full for all demands for such service: *Provided further*, That in expending the money appropriated by this act, a railroad company which has not received aid in bonds of the United States, and which obtained a grant of public land to aid in the construction of its railroad on condition that such railroad should be a post route and military road subject to the use of the United States for postal, military, naval, and all other Government service, and also, subject to such regulations as Congress may impose restricting the charges for such

> Government transportation, having claims against the United States for transportation of troops and munitions of war and military supplies and property over such aided railroad, shall only be paid out of the moneys appropriated by the foregoing provision on the basis of such rate for the transportation of such troops and munitions of war and military supplies and property as the Secretary of War shall deem just and reasonable under the foregoing provision, such rate not to exceed sixty per centum of the compensation for such Government transportation as shall at the time be charged to and paid by private parties to any such company for like and similar transportation; and the amount so fixed to be paid shall be accepted as in full for all demands for such service.

Except for this act, the maximum has always been fifty per cent and the maximum has always been paid.

The provision that the amount so fixed and paid "shall be accepted in full for all demands for such service" has been included in every Appropriation Act since. The acts making appropriations out of which claimant was paid for all services now sued upon, each of which contains said proviso, are Act of March 3, 1909, ch. 252, 35 Stat. 732, 745; Act of March 23, 1910, ch. 115, 36 Stat. 243, 256; Act of March 3, 1911, ch. 209, 36 Stat. 1037, 1050; Act of August 24, 1912, ch. 391, 37 Stat. 569, 582; Act of March 2, 1913, ch. 93, 37 Stat. 704, 715; Act of April 27, 1914, ch. 72, 38 Stat. 351, 364–365.

The Appropriation Act of March 23, 1910 (ch. 115, 36 Stat. 243, 255) added the following proviso:

> *Provided*, That hereafter baggage in excess of regulation change of station allowances may be shipped with such allowances, and reimbursement collected for transportation charges on such excess.

The Appropriation Act of April 27, 1914 (ch. 72, 38 Stat. 351, 365) added the following proviso:

> *Provided further*, That hereafter private mounts of officers in excess of the authorized mounts may be shipped on Government bill of lading with authorized mounts, and reimbursement collected for transportation charges on such excess mounts.

This was held by the Court of Claims (*Illinois Central Railroad Company* v. *United States*, 52 Ct. Cls. 53) to apply only "to officers who are changing stations."

After the judgment of the Court of Claims in *Chicago, Milwaukee & St. Paul Railway Company* v. *United States*, Feb. 8, 1915, the comptroller still held, rightly, we think, that if payments for transportation of officers' regulation baggage allowance could be made at all, it could only be made in accordance with the only appropriation available, namely, that provided by army appropriation acts, which limited land-grant roads to fifty per cent of commercial rates. (22 Dec. Comp. Treas. 263.)

Thereafter, in the Appropriation Act of August 29, 1916 (ch. 418, 39 Stat. 619, 634), the following provision was incorporated:

> *And provided further*, That nothing in the preceding provisos shall be construed to prevent the accounting officers of the Government from making full payment to land-grant railroads for transportation of property or persons where the courts of the United States have held that such property or persons do not come within the scope of the deductions provided for in the land-grant acts.

These Appropriation Acts are to be read in connection with the appropriate provisions of the land-grant acts, which provided that land-grant railroads shall be "free from toll or other charge upon the transportation of any property or troops of the United States"; the equalization agreements, by which claimant (which is not a land-grant road) is bound by the land-grant provisions, and by which claimant agreed (Finding II, R. p. 7) "to accept for the transportation of property moved by the Quartermaster Corps, United States Army, and for which the United States is lawfully entitled to reduced rates over land-grant roads, the lowest net rates lawfully available, as derived through deductions account of land-grant distance from a lawful rate filed with the Interstate Commerce Commission from point of origin to destination at time of movement"; and the Army Regulations, by which the baggage of an officer to the extent considered necessary in the performance of his duty upon change of station was delivered to the quartermaster for packing and shipment at Government expense, a clear distinction being drawn

between the necessary allowance transported by the Government and the excess over the allowance for which the officer himself paid full rates.

The property in question was clearly classed by the Government as "property moved by the Quartermaster Corps, United States Army, and for which the United States is lawfully entitled to reduced rates over land-grant roads,"—witness the appropriations made for that purpose year after year, the Army Regulations, the payment of all bills for such transportation out of such appropriations; the opinion of the comptroller in 1904 (XI, Dec. Comp., 174) that the excess over the authorized allowance was not Government transportation, and other opinions since.

It was just as clearly recognized as transportation of such property by the claimant, for its petition in this case alone shows that it presented 176 bills for payment out of these appropriations which were only available to pay for transportation of Government property. It not only presented its bills at land-grant rates, but certified that they were correct, making no claim whatever that other rates were applicable. It received payments out of these appropriations, under law, which provided in terms that such payments "shall be accepted as in full for all demands for such services." Can it now be heard to say that it is not bound by its own acts, performed with full knowledge of the facts and the law, and having been in no way deceived or misled by any officers of the Government?

In claimant's brief it is contended that it is not bound by the provision of law under which it accepted payment because the property transported was private property of the officers, not property of the United States at all, and hence not covered by the law. If this is true, then claimant has been paid the amounts billed to the Government by it without authority of law. It has been a party (innocently, of course) to the payment of private bills out of the public treasury. Upon this theory the Government should recover back from claimant public moneys unlawfully paid to it, leaving claimant to recover from the officers whose property was shipped. Unless this property came under the head of property of the United States, construing the land-grant acts, appropriation laws, Army Regulations, and equalization agreements together, then there is no authority to pay anything for its shipment, and no officer could bind the United States to pay for such shipment. If it does come within the class of such property, and we contend it does, its transportation is entitled to reduced rates.

However, claimant having received payments under a law must be held to have accepted them according to the terms of the law and is bound thereby.

III.

The presentation of its bills, without reservation or protest, in the exact amounts for which they were approved and paid by the Government, estops claimant from now asserting that such bills were not for the full amount due.

The exact contention made in this case was first made in a suit brought by the *Baltimore & Ohio Railroad Company* v. *The United States*, decided June 14, 1917, 52 C. Cls. 468. In that case there is an exhaustive opinion by Judge Downey, former Comptroller of the Treasury, holding that the railroad company having without compulsion and without being misled in any way prepared its bills for shipments made by the Quartermaster Corps of the Army, certified that these bills were correct, received payment for the same and closed the transaction so far as it was concerned, could not, after a determination by a court upon a question of law, reopen its accounts against the Government and put in bills for additional amounts on account of the same service. No appeal was taken by the railroad from the judgment of the Court of Claims in that case. It is apparent that the claimant tries to escape from the holding in the *Baltimore & Ohio case* by alleging that its rendition of bills against the Government for these freight shipments and the payment and receipting of such bills was a matter of continuous accounting between it and the Government under which any and all accounts could be opened and restated at any time within the limitation period. Also (p. 8

claimant's brief) because its auditors and agents were led to believe that the property shipped was Government property and also because the Comptroller of the Treasury had held that such shipments were entitled to land-grant rates and that in presenting its bills and accepting payment at land-grant rates it did not intend to waive its right to sue for an additional amount if so advised.

As to the first contention that the settlement for such freight transportation was regarded by the United States as a matter of accounting the Court of Claims does not so find, but it does find that the accounts were treated as closed by claimant. That each shipment constituted a separate transaction or account and upon rendition of the bill and its payment that account was closed. (Finding VI, R. pp. 12–15.) Were it not for this finding, which is, of course, conclusive, it is submitted that the question in this case is not one of accounting at all but is one of law, and it is difficult to conceive upon what theory it can be claimed that the question as to whether the claimant was entitled to full commercial rates or land-grant rates on these shipments was to be left open subject to future determination by accounting officers when no claim had been presented to either disbursing or accounting officers or to the comptroller by the claimant that it was entitled to full commercial rates; and when, as appears from the record, the Government had never even considered the proposition of paying other than land-grant rates. It is also difficult to conceive why claimant,

if it considered that this matter was a subject of accounting upon which at least fifty per cent more than it had received was justly due, would allow year after year to elapse, thus effectually barring any claim it might have without asking for an accounting, presenting a bill showing its claim, or instituting suit. It is apparent also from the manner in which each shipment was made and paid for that it constituted a closed transaction so far as the Government was concerned and that no disbursing officer of the Government would have power to pay a claim of this character, leaving open for future determination the matter as to whether or not the Government should pay more.

The fact that certain bills rendered by railroads for shipments of Government property upon being audited were corrected on account of mistakes made has no bearing whatever upon this question. Even if claimant had made a mistake in stating its bills for a less amount than it should have stated them, no corrected bills were presented or asked to be presented nor was any restatement of account asked. As to the contention that the bills were rendered as they were because the shipments were made for the Quartermaster's Department of the Army upon Government bills of lading which were applicable only to Government property, if it is contended that by this claimant was led to believe that it was shipping property which actually belonged to the Government and was not shipping officers' change of station allowance for the Government, the contention is at variance with

Finding IX of the Court of Claims (R. 17, 18), with the Army Regulations (Finding IV, R. 8), knowledge of which the claimant must have had, and the decision of the comptroller upon which claimant relies (XI Comp. Dec. 174), where the Illinois Central Railroad Company contended "that the personal effects of an officer of the Army, *over and above his authorized allowance on change of station*, is not in any sense the property of the United States." (Italics appear in the original opinion.) This opinion was rendered October 13, 1904. It shows that the railroads recognized fully just what property they were transporting on the Government's bills of lading. In addition, this opinion shows that the contention that the railroads believed that they were entitled to full commercial rates on shipments of officers' property and reserved their right to advance such claim was not thought of; that, on the contrary, at that time they acquiesced in the view that an officer's authorized allowance of baggage on change of station, the transportation of which was paid for by the Government, was entitled to the land-grant rates, for the claim which was the subject of this decision by the comptroller was only for full rates on the *excess* over such allowance and no question was made as to the land-grant rates on the allowance.

The contention that claimant can escape the effects of presentation and settlement of its accounts because the comptroller had ruled that such transportation was entitled to land-grant rates is unimportant except as it may be claimed that if such ruling

was made it shows that the railroad companies had made this contention and therefore had put the Government upon notice that they claimed the right to recover such balance if at any time it might be decided that they were entitled to it. The question was never presented to the comptroller for his opinion and no such direct ruling was ever made by him. It is conceded that he would have made it had it been presented, and it appears from the record, various opinions of the comptroller, and the conduct of the railroads, including claimant, that it was well understood that the Government regarded these shipments as entitled to land-grant rates and would only pay on that basis. It was not presented by claimant, and, so far as we have been able to ascertain by examination of the comptroller's decision, the question was never presented by any railroad. It seems to have been assumed by all concerned from the beginning of such shipments until the date of the decision in the *Chicago, Milwaukee & St. Paul case* by the Court of Claims that such shipments were entitled to land-grant rates upon the theory, as well expressed in the decision of the comptroller of October 13, 1904, above referred to, that the officers were officers of the United States Army, that the baggage allowance upon change of station was considered necessary for the officer in the discharge of his duties, and that therefore it was proper for the Government to pay for its transportation as public property. It is true the Court of Claims finds that as far back as 1891

that the attorney of the claimant company expressed his opinion to the comptroller that such shipments were not entitled to land-grant rates and that he was informed by the comptroller, with whom he discussed the matter, that if not satisfied with the decisions his redress was in the courts. It does not appear that at the time of these conversations there was any claim pending before the comptroller involving this question; there is no ruling made upon it by the comptroller and it does not appear that the opinion of the attorney was ever communicated to his clients. If it was, then it does appear negatively that such opinion was never acted upon in any way.

The fact that it was useless to present such claim to the comptroller because it was known what his ruling on it would be does not relieve the claimant from the fact of not presenting such claim. Claimant's bills were presented to the disbursing officers, the quartermasters who had no power whatever to make deductions from, additions to, or alterations in bills, but could only pay bills as presented. As pointed out in the opinion of the Court of Claims, the claimant could have presented its bills in any amount that it claimed to the proper auditor, who would have authority to allow or disallow the claim in whole or in part, and from this allowance in whole or in part an appeal could be taken to the comptroller for the revision of the allowance of the auditor. The opinion of the comptroller would, of course, be binding upon the auditor and the disbursing officers, but

it would not be binding upon the claimant if it exercised the right it would still have to sue in the Court of Claims. The way was open at all times to it to present its claim for any rate it deemed applicable and to have the matter definitely determined. Knowing all the facts, it presented its claim for the amount it stated to be correctly due it to the disbursing officer, received and receipted for the amount thus billed, and closed the transaction on its books and never at any time made any attempt to have the matter reviewed. It was essential that it should do this if it was dissatisfied with the rate which the Government had been paying and would continue to pay, as it well knew.

United States v. *Adams*, 7 Wall, 463, we think, is applicable to this case. It is true in that case the claim was submitted to a board, but the board had no final authority nor could submission of the claim to that board have been compelled. In the present case there was a forum available to claimant at all times for the determination of any claim it might make. Having made out and submitted its claim to a disbursing officer and received payment in full, it can not be presumed that it intended to split up its claim and later submit another item of it to the auditor or comptroller or to a court. It could and must have done this at the time it presented and submitted its original claim. As stated by the court in the *Adams case* at page 481—

> This is not the course of litigation between private parties; they are not allowed to split

> up an entire contract or demand into several parts; and we are not aware of any reason for an exception to the rule in a proceeding against the Government. We can not think that a further hearing before any other tribunal of the same matters was within the contemplation of either party.

In *United States* v. *Child & Company*, 12 Wall. 232, the doctrine of *United States* v. *Adams*, cited above, was approved. In that case a very substantial deduction was made from the amount claimed to be due from the Government. The amount allowed was accepted and receipt in full given. The court held, as in the *Adams case*, that the giving of a receipt in full is of no great significance of itself but that the bar existed on account of the voluntary submission of the claim, the hearing, the final decision thereon, and receipt of the sum found due without formal objection or protest. It is true in this case there was no hearing. But we submit that the principle is applicable because the claimant could have had a hearing at any time. As stated in the *Child case* (p. 243), "but though the claimants might have refused to abide by the decision of the board and sought relief from the Court of Claims or from Congress, they did not do so." Thus in the case at bar the claimants were under no compulsion whatever to present claims for a less amount than they thought due nor to accept payment for the same. They did this, however, without protest. How can they have any higher right than if the claim had been presented in the

full amount to the auditor or comptroller and the deductions, which claimant itself made, had been made by the auditor or comptroller and claimant had then receipted in full without protest. If claimant takes the view that there was a dispute between it and the Government as to the amount due, then the case against it is even stronger, for the amount received and receipted for by claimant without protest would be treated as compromise. It is apparent that if claimant had presented the bill for full rates it would have been disputed by the Government. Claimant, according to its statement, did not present the bills in such amount because it knew the Government would dispute them. Therefore it acquiesced in the Government's view, and by accepting payment and by failure to indicate in any way that it claimed a larger amount settled its claims.

In the case of *Railroad Company* v. *United States*, 103 U. S. 703, the claimant accepted adjustments made by the Postmaster General in amounts less than it claimed it was entitled to, making no objection or protest to the amounts paid. The Court of Claims held that the company was estopped from afterwards asserting its right to recover such additional amounts. The Supreme Court says (p. 704):

> In this we think the Court of Claims was right. It must be held to have known on what basis of weight and distance these adjustments were made. They were made frequently, and the sums which, by those adjust-

ments, were due to each company were paid monthly or quarterly.

If the claimant, during all this time, stood by contentedly and saw the money which it now claims paid to the other company, and received and receipted for the money paid it on that foundation, it would be inequitable to permit it now to recover, and thus make the Government pay twice. For the time the mails were carried after this notice or assertion of the present claim it has recovered judgment, and the Government has not appealed. For what it lost by its neglect in making claim on these settlements when receiving payment, it must submit to loss.

In *Central Pacific Railroad* v. *United States*, 164 U. S. 93, the railroad company had transported post-office inspectors, under Regulations of the Post Office Department, without compensation, for a number of years; and had presented its accounts to the Government and had them settled without making any claim for compensation for such transportation. The court states, pages 99–100:

Whether the services for which the company has been paid were performed under the Act of 1862 or under the Revised Statutes, the material fact is that the company has claimed and been awarded compensation for certain services in connection with the mails, and at the same time has failed to make any charge or claim for services connected with the transportation of post office inspectors. Such omission is further evidence of waiver.

The court also states on page 99:

> One of the material facts lacking in the case at bar was present in the case cited, viz, the continuous claim on the part of the company as to its right, its ever-present dispute with the Government in regard to the correctness of the claim, and its protest against the Government's construction of the law. Instead of that we have absolute silence on the part of the claimant here for many years and a peaceful acquiescence in the demand made by the Government for the free transportation of these officials.

In *United States* v. *Garlinger*, 169 U. S. 316, an inspector at the port of Baltimore after his employment had ceased brought suit to recover compensation additional to what he had been paid. The court states (p. 323):

> We do not want to be understood as saying that the mere fact of receiving money in payment will estop a creditor. But where, as in this case, the payments were made frequently, through a considerable period of time, and were received without objection or protest, and where there is no pretense of fraud, or of circumstances constituting duress, it is legitimate to infer that such payments were made and received on the understanding of both parties that they were in full. Such a presumption is very much strengthened by the lapse of two years before the appellee thought fit to make any demand.

The case of *Chicago & North Western Railway Company* v. *United States*, 104 U. S. 680, relied upon by claimant, illustrates one of the fatal defects in claimant's case. In that case the company was notified of reductions from the compensation to which it was entitled under its contract; it protested against the reductions being made, but they were nevertheless made by the department. It was forced to carry the mails at a compensation lower than that provided by its contract; it protested against the deduction and claimed that it was entitled under the law and its contract to a definite amount which could not be decreased. This is far different from the case at bar.

Claimant relies on the cases of *Pickley* v. *United States*, 46 C. Cls. 77; *Great Northern Railway Company* v. *United States*, 42 C. Cls. 234; and *James B. Finney* v. *United States*, 32 C. Cls. 546. All of these cases were cited in the court below, and were held not applicable. As the *Baltimore & Ohio case* and the present case are both later than the cases cited, it would seem that even had they been applicable, they were not followed.

Claimant's theory, sought to be established by these cases, is that unless a dispute exists, payment of a less sum than is admittedly due can not preclude the creditor from afterwards suing for the balance. It is true that in the present case there was no existing dispute consisting of claims and denials. But claimant says it knew what the Government would pay and that is was useless to ask more. If it claimed

more than it knew the Government would pay, then it knew its claim was disputed. If it did not make this claim, then it clearly acquiesced in the Government's view and settled its account. The Government never admitted, nor was it suggested by claimant, that any amount in excess of what the Government was willing to pay was or might be due. In the cases claimant relies on an admitted amount was due and the claimant was paid and receipted for a less amount. Here claimant was paid and receipted for all that it claimed to be due, knowing full well that if it claimed any greater amount its claim would be disputed.

United States v. *Bostwick*, 94 U. S. 53, is authority directly against claimant. (See p. 67.)

Baird v. *United States*, 96 U. S. 430, is a case very much in point. There Baird had submitted his claim to the Government; it was audited, and a large deduction made; he was informed of the allowance and the reasons therefor, received and receipted for the amount allowed, afterwards suing for the difference. It is stated in the opinion of the court (pp. 431–432):

> It is no doubt true that the payment by a debtor of a part of his liquidated debt is not a satisfaction of the whole, unless made and accepted upon some new consideration; but it is equally true that, where the debt is unliquidated and the amount is uncertain, this rule does not apply. In such cases the question is whether the payment was in fact made and accepted in satisfaction.

> It is clear that in September, 1864, when this account was first presented to the Government, the amount due was uncertain, because more was then demanded than is now claimed. The counsel for the appellant say, in their argument, that this reduction has been made in the light of the testimony taken in the suit for indemnity. Under such circumstances it was the duty of the auditing officers of the Government to state the account themselves before making payment. This they did, and reported to the claimant the amount found due, with the principles upon which the adjustment had been made. In effect, this was an offer to pay the balance stated in satisfaction of the claim. The acceptance of the money afterwards, without objection, was equivalent to an acceptance of the payment in satisfaction.

In *Chicago, Milwaukee & St. Paul Railway Company* v. *Clark*, 178 U. S. 353, the claim was made that (p. 364) "where a liquidated sum is due, the payment of a less sum in satisfaction thereof, though accepted as satisfaction, is not binding as such for want of consideration. *Cumber* v. *Wane*, 1 Strange, 426."

Mr. Justice Fuller, after stating that this rule has been much questioned and qualified, states (p. 365):

> The result of the modern cases is that the rule only applies when the larger sum is liquidated and when there is no consideration whatever for the surrender of part of it;

> and while the general rule must be regarded as well settled, it is considered so far with disfavor as to be confined strictly to cases within it.

Then follows a review of the cases, at the end of which it is stated (pp. 368–369):

> Without analyzing the cases, it should be added that it has been frequently ruled by this court that a receipt in full must be regarded as an aquittance in bar of any further demand in the absence of any allegation and evidence that it was given in ignorance of its purport, or in circumstances constituting duress, fraud, or mistake. [Citing authorities.]

Clearly claimant's case is very far without the general rule. The "larger sum" not only was not and is not liquidated; it was never even suggested. If it had been, it would immediately have been unliquidated by absolute dispute. Can one say an undisputed amount is due him because he concealed his claim, knowing it would be disputed if advanced? So far as claimant is concerned, if it really thought it had a claim prior to the decision in the *Chicago, Milwaukee & St. Paul case*, it knew its claim was disputed; therefore, by accepting payment in full, it settled.

IV.

If, as alleged in the petition, claimant's failure to present bills for the amount to which it now claims to be entitled was due to mistake, the mistake was of law.

The record shows that the bills to the Government were prepared by claimant's own auditors; no deductions were made by the quartermasters or other disbursing officers to whom the bills were presented, but they were paid as prepared and presented by claimant. There was no dispute as to facts; it was known to all concerned that the property was shipped as the baggage allowance of Army officers on change of station. Assuming that the comptroller had definitely held that such shipments were entitled to land-grant rates, that holding must have been based on his construction of the law (Act of March 3, 1863, 12 stat., 772, and other similar acts), i. e., that land-grant railroads—

> shall be and remain public highways, for the use of the Government of the United States, free from all toll or other charge upon the transportation of any property or troops of the United States,

and that such baggage was, for the purposes of that Act and the Appropriation Acts, property of the United States. If he was mistaken as to this, claimant was also mistaken. It is inconceivable that it could correctly interpret the law and yet continue for years to render bills for fifty per cent less than it was entitled to under the law. It must have assumed

that the comptroller's construction was correct, otherwise it would have brought suit to test the matter or presented to the auditor or comptroller bills claiming full rates; or, at least, in some manner have protested to some one, or lodged notice somewhere, that it contended it was entitled to full rates and that it presented its bills and received payment without prejudice to its right to demand and enforce payment of the amounts to which it claimed to be entitled. The comptroller's mistake of law, if he made one, was also made by claimant and bars recovery.

> In short, and to sum it up in a word, so far as we can see from this record the transaction was purely voluntary on his part, and that while there was a mistake it was mutual and one of law—a mistake on his part not induced by any attempt to deceive or misrepresentation by the Government officials. (*United States* v. *Edmondston*, 181 U. S. 500, 515.)
>
> It has been held from the earliest days, in both the Federal and State courts, that a mistake of law, pure and simple, without the addition of any circumstances of fraud or misrepresentation, constitutes no basis for relief at law or in equity, and forms no excuse in favor of the party asserting that he made such mistake. (*Utermehle* v. *Norment*, 197 U. S. 40, 56.)

V.

If there was no mistake claimant is concluded by its contract.

In claimant's brief (pp. 26, 27) it is stated:

> The situation here is that *the Government* is endeavoring to avoid responsibility for the balances due claimant under this plea of mistake of law, having set up, by way of defense to this suit, that the claimant rendered its bills for less than the full amount due it by mistake as to its full legal rights in the premises. This claimant denies, and there is no finding by the court to any such effect. On the contrary, the fair presumption from what the Court of Claims said in its opinion, and from the allegations of the petition, is that claimant was not laboring under any mistake as to its legal rights, but merely rendered its bills at land-grant rates because it knew the disbursing and accounting officers of the Government, following the comptroller's views and decisions would not pay full commercial rates therefor, although in some instances, and probably at first, it or some of its officers might not have known that the property shipped was not Government property, which would be a mistake of fact.

That is, the Government presented certain property to the railroad for shipment, stating the rate it would pay for such shipment; the railroad received the property, transported it, presented its bill for the exact amount which the Government had notified it would pay, certified that said bill was correct, and receipted for the payment for the same. It made no

protest that it was entitled to a higher rate; it made no claim of any kind for a higher rate; it lodged no notice of any kind anywhere that it was dissatisfied with the rate paid or that it ever had any intention of claiming any other or higher rate. It did this not only with one shipment but with 176 shipments (Finding VII, R. 15) during the six years immediately preceding the filing of the petition in this case and undoubtedly for many more prior to that time. The Court of Claims finds (Finding VI, first paragraph, R., p. 12, and last paragraph, top of p. 15):

> In rendering its vouchers to the defendant for the transportation referred to in this case the claimant company made deductions on account of land grant from the amounts which would have been due therefor at commercial or tariff rates, and claimed only the balance, accepting payment in the sums so ascertained and claimed without protest.
>
> For the transportation here involved and for like transportation theretofore, claims for which were stated in the same way, the plaintiff company and its predecessor company, whose properties, franchises, and accounts it acquired charged upon its books the net amounts determined as above stated and claimed in its vouchers and no more, and upon payment of an amount thus claimed and charged as to any shipment the transaction was regarded as (quoting the language of the company's auditor) "behind us."

The court further finds (last paragraph Finding V, R., p. 12):

> It is not shown that plaintiff was ever deceived or misled as to the character of these shipments, and the evidence does not justify a finding that plaintiff's officer charged with the duty of presenting and collecting claims for the transportation here involved ever believed or had reason to believe that the property transported was Government-owned property.

There is no allegation or finding to the effect that claimant was compelled in any way to accept this property and transport it for the rate named. Therefore claimant, having rendered this service without compulsion, knowing what the Government intended to and would pay for the same, having presented bills for this exact amount, and upon payment of said bills having closed each account on its books without even any notation thereon that the account was open or that there was a balance claimed to be due, is now precluded from asserting any different or other claim. A contract was made and carried out, both parties knowing the amount that would be paid for the services required by the contract, which amount was paid and receipted for. The fact that claimant might have charged and collected a larger amount is immaterial. It did not do this, but performed the services without compulsion, knowing what it was to receive for the same and receiving that amount without any protest. The case is fully covered by the decisions of this court in *Eastern Railroad Company* v. *United States*, 129 U. S. 391; *Delaware, Lackawanna & Western Railroad Company* v. *The United*

States, 249 U. S. 385; *New York, New Haven & Hartford Railroad Company* v. *The United States,* 251 U. S. 123; and the *Mail Divisor Cases,* 251 U. S. 326.

VI.

The request for additional findings of facts is improperly before the court; it is also without merit.

Rule 5 of this court, adopted December Term 1869 (9 Wall., VII) (claimant's brief p. 5), was superseded by present rule 5, adopted October Term 1907, 210 U. S. 507, which reads:

> In every such case, each party, at such time before trial and in such form as the court may prescribe, shall submit to it a request to find all the facts which the party considers proven and deems material to the due presentation of the case in the finding of facts.

Rule I (210 U. S. 505) provides what shall constitute the record on appeal.

The stipulation that the motion for amended and additional findings of fact might be considered as a part of the transcript of the record was made, on the part of the Government, in view of the approved practice under which claimant could move for a remand to the Court of Claims for additional findings and such motion be considered by the court on submission of the case; that is, the Government is willing to regard the matter as if a motion for remand had been made.

It is submitted, however, that the requests are without merit and that the case is fully covered by

the facts as found. Of course, in so far as the motion tends to request the Court of Claims to change findings made it is futile, as the findings are conclusive.

The proposed amendment to Finding VI is covered by Findings VI (R. p. 2–15) and IX (R. p. 17–18).

The request is, in fact, for the Court of Claims to change a negative to a positive finding. The court has found the facts, and neither they nor the statements of the company's auditor as to his mental reservations in any way substantiate the conclusion which claimant asks to be incorporated in Finding VI as an amendment.

Proposed additional finding of fact X is rather an argument that certain conclusions should follow from facts found. The Court of Claims has found the facts which show that the question in dispute in this case is not and never was a matter of accounting. Its conclusion, from the facts found, is that both parties regarded the settlements as final, not as tentative.

Proposed additional finding of fact XI is a request to find evidence. This is contrary to the rules. Also the evidence asked to be found is entirely immaterial.

CONCLUSION.

It is respectfully submitted that the judgment of the Court of Claims should be affirmed.

FRANK DAVIS, JR.,
Assistant Attorney General.

JANUARY, 1921.

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